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No. 87-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TERRE DU LAC ASSOCIATION, INC.,
Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATES, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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(*Continued inside front cover*)

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents Terre Du Lac, Inc., Terre Du Lac Golf & Country Club, Inc., TDL Country Club Associates, C.I.T. Corporation, Sensibar Enterprises, Inc., Moill, Ltd., and James O. Kwon respectfully request that this Court deny the petition for writ of certiorari seeking review of the Opinion of the United States Court of Appeals for the Eighth Circuit. That Opinion is reported at 834 F.2d 148 (1987).

STATEMENT OF THE CASE

This case is one of two pending actions in which plaintiff Terre Du Lac Association (the Association) seeks specific per-

formance of promises allegedly made to its members. In *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, No. CV685-1050, currently pending in the Circuit Court of Cape Girardeau County, Missouri, the Association seeks relief on a theory of breach of contract. In the instant action, the Association seeks the same relief under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. § 1961 *et seq.*

The Parties.

The Association is a Missouri non-profit corporation. All persons owning lots in the Terre Du Lac subdivision must join the Association and pay its mandatory assessments. Respondent Terre Du Lac, Inc. (TDL) is a Missouri corporation which developed the Terre Du Lac project. Respondent James O. Kwon is its president and a principal shareholder. Defendant Sensibar Enterprises, Inc. (Sensibar) is a corporation which acquired voting control of TDL following TDL's Chapter 11 reorganization in 1977. On December 30, 1980, Sensibar conveyed all of its interest in TDL to others.

Respondent C.I.T. Corporation (C.I.T.) is a lending institution, which has been the principal lender for the project since 1973. TDL Country Club Associates (TDL Associates) is a Missouri limited partnership that owns and operates the country club facilities in the Terre Du lac development. Moill Ltd is the general partner of TDL Associates. Terre du Lac Golf & Country Club Inc., is an inactive Missouri corporation that owns no tangible assets.

The Alleged Pattern.

The Association alleges that, as a part of its sales campaign, TDL misrepresented its intention:

(a) to complete all roads in the subdivision with an asphalt surface over a stabilized base;

(b) to convey the amenities and common areas of Terre Du Lac to the Association, free and clear of liens and encumbrances; and

(c) to complete the water and sewage disposal systems in Terre Du Lac.

Complaint ¶ 128(a).[1] In its pending action in the state court, the Association seeks to enforce the same alleged promises in contract.

The 1962(a) Claim.

The Association alleges that TDL made these promises in connection with the sale of every lot sold since 1977. Complaint ¶ 128(b). TDL used the proceeds of those sales to pay debt service on its loan to C.I.T., and dividends to Sensibar. Complaint ¶¶ 130-31. C.I.T. and Sensibar retained those payments. The Association alleges that this "investment" of the proceeds of racketeering activity in "enterprises," to wit, C.I.T. and Sensibar, violates 18 U.S.C. § 1962(a). The Association does *not* allege that its "injury" is causally related to this "investment," as opposed to the alleged pattern of racketeering activity.

The 1962(c) Claim.

The Complaint identifies two "enterprises" whose affairs were conducted by the alleged pattern of racketeering activity: TDL, and an association-in-fact comprised of all defendants. Complaint ¶ 132. The Complaint does not allege that either "enterprise" has any existence apart from the alleged scheme to defraud. On the contrary, the Complaint alleges that both the association-in-fact and TDL allegedly committed fraud on every prospective purchaser of a lot in Terre Du Lac. Complaint, ¶ 128(b).

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[1] The Complaint is attached to this brief as an Appendix.

The Association's "Injury" and Proposed Relief.

The Association alleges that it has sustained injury to its business or property, by reason of the alleged "racketeering," in three ways:

A. C.I.T. and Sensibar have invested monies paid by TDL in themselves, rather than investing those monies in the Terre du Lac infrastructure.

B. The failure to provide asphalt roads has increased the Association's maintenance expenses, because asphalt roads are less expensive to maintain than gravel roads.

C. The alleged fraud induced the sale of additional lots, resulting in greater use of existing roads and common facilities.

Complaint, ¶ 134-36.

The Association has judicially admitted that it has refused to accept the conveyance of *any* roads which are not paved with asphalt. The Association has also admitted that it does not own the "common facilities". *Terre Du Lac Association v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 211 (Mo. App. 1987).

The Association seeks specific performance of the alleged promises pursuant to 18 U.S.C. § 1964(a). Count XV, Prayer. The Association has vigorously contended that damages are an alternative, and less preferred, remedy.

The State Court Litigation.

The Association filed its state court action in 1984. The trial court dismissed for failure to state a cause of action. On appeal, the Missouri Court of Appeals affirmed in part and reversed in part. *Terre Du Lac Association v. Terre Du Lac, Inc., supra,* 737 S.W.2d at 206. That Court held that, as a third-party

beneficiary, the Association could enforce promises allegedly made to its members. Thus, the Court allowed the Association to proceed against TDL, Kwon and Sensibar.

The Court affirmed the judgment of dismissal in favor of C.I.T. The sole ground for relief against C.I.T. was its alleged status as a joint venturer with TDL. The Missouri Court of Appeals found, as a matter of law, that C.I.T. was not a joint venturer with TDL.

REASONS WHY THE WRIT SHOULD BE DENIED

The Association urges this Court to grant its petition for a writ of certiorari, primarily because the Court has granted such a petition in *H.J. Inc. v. Northwestern Bell Telephone Co.*, No. 87-1252, *cert. granted,* 56 U.S.L.W. 3647 (March 21, 1988). Petition for Writ of Certiorari ("Petition") at 9-10. Respondents submit that *no* Circuit Court of Appeals would conclude that this Complaint states a cause of action under RICO. To be sure, the different Circuits might reach that result via different routes. The result, however, would be the same.

The Eighth Circuit's *holding* in this case was that the Complaint failed to state a claim on which relief could be granted. 834 F.2d at 148-49. Like the Second, Fourth and Tenth Circuits, the Eighth Circuit found no RICO pattern. Other Circuits would reach the same result via analysis of the "enterprise" requirement under § 1962(c). All Circuits would find that the Association had sustained no injury to its business or property "by reason of" any alleged RICO violation.

Thus, this case presents a singularly poor vehicle to resolve any disagreement concerning the proper scope of RICO. Moreover, denial of the Petition would work no manifest injustice on the Association. It would merely end federal proceedings that have been terminally ill since their inception. There is no reason for this Court to prolong the agony.

I. The Eighth Circuit's Holding On The § 1962(c) Claim Conflicts With No Other Decisions, Because There Is No RICO Pattern And There Is No RICO Enterprise.

In *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court recognized the "extraordinary" uses of civil RICO and acknowledged that the statute has evolved into something "quite different" from its original purposes. 473 U.S. at 500. This Court attributed these abuses of civil RICO to its bredth and ambiguity. 473 U.S. at 500.

This Court has also recognized, however, that RICO's purpose was to eradicate organized crime. *United States v. Turkette,* 452 U.S. 576, 588-89 (1981). Congress recognized that a direct ban on "organized crime" would be constitutionally suspect and difficult to apply. Instead, Congress chose to define conduct *characteristic of organized crime,* and to prohibit such conduct:

> The reach of the statute beyond traditional mobster and racketeer activity in comparable ongoing structured criminal enterprises, was intented to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime.

ABA *Report on Civil RICO* (1985), at 72, quoted in *Sedima,* 473 U.S. at 526 (Powell, J. dissenting). The civil remedy contained in § 1964(c) must reflect that principal objective. 473 U.S. at 498.

Thus, *Sedima* requires a determination of whether the conduct in question is the type of ongoing criminal activity at which RICO was aimed. A civil RICO action requires more than a collection of alleged predicate offenses. It requires the structure, organization and continuity characteristic of organized crime. As the parallel state proceedings reflect, the instant action does not involve such conduct.

It is hardly surprising, therefore, that the other Circuits would agree with the Eighth Circuit's ultimate conclusion: this Complaint fails to state a claim. Some Courts would approach the issue from the standpoint of "pattern." Others would find no "enterprise." These semantic differences do not constitute a conflict in the Circuits warranting review of this case. The Second Circuit's latest pronouncement on RICO is illustrative:

> Although, except in *Albany,* we speak in terms of "enterprise" rather than "pattern," we nevertheless require continuity in any event and find insufficient evidence of con-

> tinuity in a single criminal episode regardless of how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern.

Beauford v. Helmsley, 843 F.2d 103 (2nd Cir. 1988).

A. The Complaint Does Not Allege A RICO Pattern.

The Eighth Circuit held that the alleged fraud was part of a single scheme to market property in Terre du Lac. Absent a claim that defendants engaged in similar activities elsewhere or in the past, there is no RICO pattern. 834 F.2d at 149. The Association acknowledges that this holding accords with prior Eighth Circuit procedent. Petition at 6.

The Second, Fourth and Tenth Circuits would concur with this analysis. While both the Fourth and the Tenth Circuits eschew a "bright line" test, both have used remarkably similar language in rejecting civil RICO claims. In *International Databank, Ltd. v. Zepkin,* 812 F.2d 149 (4th Cir. 1987), the Fourth Circuit held:

> To allow a "pattern of racketeering" to flow from a single, limited scheme such as this one would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistance pose a special threat to social well-being.

812 F.2d at 155. *Accord, Flip Mortgage Corp. v. McElhone,* 841 F.2d 531 (4th Cir. 1988).

In *Torwest DBC, Inc. v. Dick,* 810 F.2d 925 (10th Cir. 1987), the Tenth Circuit reached a similar conclusion. The Tenth Circuit subsequently described the facts in *Torwest* as comprising:

> only one scheme, one result, one set of participants, one victim, one method of commission, and thus, no continuity and no pattern of racketeering activity.

Condict v. Condict, 826 F.2d 923, 928 (10th Cir. 1987). The Tenth Circuit found "no threat of continuing fraudulent activity," and nothing to suggest that defendants had undertaken or planned to undertake any other fraudulent activity. 810 F.2d at 929. Hence, there was no pattern.[2]

Other Circuits might approach the problem differently. In earlier holdings, the Second Circuit focused primarily on the question of a § 1962(c) enterprise. E.g. *Beck v. Manufacturer's Hanover Trust Co.,* 820 F.2d 46, 51-52 (2nd Cir. 1987), *cert. denied,* 108 S.Ct. 698 (1988). In *Beauford v. Helmsley, supra,* however, the Second Circuit recognized that the label is less important than the result. A "discrete, finite . . . scheme" is insufficient to state a RICO claim, whether the basis for that ruling is the "pattern" requirement or the "enterprise" requirement.

Since the Association does not allege an appropriate enterprise under § 1962(c), the other Circuits would affirm the dismissal on that basis.

B. The Complaint Does Not Allege An Enterprise Under § 1962(c).

In *United States v. Turkette, supra,* 452 U.S. at 583, this Court held that RICO requires an "enterprise" separate from the pattern of racketeering activity. The Complaint identifies two "enterprises" whose affairs were allegedly conducted through a RICO pattern: TDL and an association in fact comprised of all defendants. Most Circuits would hold this pleading

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[2] The Association's contention that this ruling restricts RICO relief to those persons who are themselves repeatedly victimized by separate schemes is clearly incorrect. A RICO plaintiff need not be injured by each separate part of the pattern in order to sue for injuries caused by one part thereof. *Marshall & Ilsey Trust Co. v. Pate,* 819 F.2d 806, 810 (7th Cir. 1987).

inadequate, because the "enterprises" are indistinguishable from the alleged pattern.

In *United States v. Anderson,* 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981), the Eighth Circuit anticipated this Court's holding in *Turkette. Anderson* holds that:

> The term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity."

626 F.2d at 1365. Most Circuits concur. *Beck v. Manufacturers Hanover Trust Co., supra,* 820 F.2d at 51-52; *United States v. Riccobene,* 709 F.2d 214, 222-23 (3rd Cir.), *cert. denied,* 464 U.S. 849 (1983); *Montesano v. Seafirst Commercial Corp.,* 818 F.2d 423, 427 (5th Cir. 1987).

The instant Complaint alleges that both the "association in fact" and TDL committed fraud on *every* prospective purchaser in an effort to sell lots in Terre Du Lac. Complaint, ¶ 128(b). Thus, according to the Association, there is no purpose or structure separable from the alleged pattern. As a result, there is no "enterprise" under § 1962(c).

Beauford alleged a fraudulent scheme to sell some 8,286 condominiums via misrepresentations commencing in 1984 and continuing to the date of the opinion. The "enterprises" were the developer and an association in fact consisting of all defendants. These allegations are identical to the Association's allegations in the instant case. The holding in *Beauford,* whether based on "pattern" or on "enterprise," is the clearest proof that the alleged conflict between the Circuits, as applied to the instant case, is pure semantics.

II. The Eighth Circuit's Holding Conflicts With No Other Decisions, Because The Association Has Itself Sustained No Injury By Reason Of Any Alleged RICO Violation.

The Association claims that the alleged violations of §§ 1962(a) and 1962(c) have injured the Association. In fact, the

Association has sustained *no* injury to its business or property "by reason of" any alleged RICO violation. Its only injuries are purely derivative of the injuries allegedly sustained by its members, and for which the Association seeks redress. Every Circuit to address these issues has concluded that such allegations do not state a claim under RICO.

A. The Complaint Does Not Allege a Causal Connection Between the Alleged Injury and the Alleged Violation Of § 1962(a).

In *Sedima,* this Court held that a RICO plaintiff can recover only to the extent that he has been injured by the conduct which constitutes the violation. 473 U.S. at 496. Section 1962(a) merely prohibits investments of funds received from a pattern of racketeering activity. The Association's alleged injury is not caused by the investment of such funds in any enterprise. Thus, the conduct which constitutes the violation has not injured the Association.

Section 1962(a) prohibits neither racketeering activity nor the receipt of income from it. The section prohibits *only* the investment of such proceeds in an enterprise. Indeed, § 1962(a) expressly exempts open market purchases of stock amounting to less than 1% of the total outstanding shares.

The Association's claim under § 1962(a) alleges:

A. TDL received the fruits of racketeering activity, in the form of the purchase price of the lots sold;

B. TDL used those monies to pay debt service to C.I.T. and dividends to Sensibar;

C. C.I.T. and Sensibar invested that money in "enterprises" — to wit, themselves; and

D. The diversion of those monies from the Terre du Lac infrastructure injured the Association.

Complaint, ¶5 130-31.

Had C.I.T. invested its debt service in General Motors stock, instead of itself, it would not have violated § 1962(a). Had Sensibar given its TDL dividends to charity, or thrown them to the winds, it would not have violated § 1962(a). In either circumtance, the Association's alleged injury would remain. Thus, there is no causal connection between the conduct constituting the alleged violation and the alleged injury.

While no Circuits have addressed the issue, the language of § 1962(a) is unambiguous on its face. Unsurprisingly, therefore, most District Courts have endorsed this reasoning. *P.M.F. Services, Inc. v. Grady,* 681 F.Supp. 549, (N.D. Ill. 1988), and authorities there cited; *Gilbert v. Prudential-Bache Securities, Inc.*, 643 F.Supp. 107, 109 (E.D. Pa. 1986).

Respondents submit that all Circuits would follow the plain language of the statute, and this Court's holding in *Sedima,* in rejecting the Association's claim under § 1962(a).

B. The Association's "Injury" Is Purely Derivative of The Alleged Injuries To Its Members.

Even in the context of RICO, the courts have maintained the distinction between injury to a corporation and injury to its members. The Association claims that it has suffered injuries separate from those allegedly sustained by its members. In fact, its pleadings in this case and in the parallel state proceedings establish exactly the opposite: its "injuries" are nothing more than derivative injuries of its members.

Racketeering acts aimed at a corporation may indirectly injure the shareholders, by reducing the value of their investment. Every Circuit to address the issue, however, has held that shareholders cannot file a RICO action for injuries sustained by a corporation. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *Rand v. Anaconda-Ericsson,* 794 f.2d 843, 849 (2d Cir.), *cert. denied,* 107 S.Ct. 579 (1986); *Levey v. E.*

Stewart Mitchell, Inc., 585 F.Supp. 1030 (D. Md. 1984), *aff'd mem.*, 762 F.2d 998 (4th Cir. 1985); *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542, 544-46 (6th Cir. 1985); *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985). The same rule ought logically to apply to a corporation allegedly injured as a result of injuries to its members.

In this case, the Association *claims* that it has sustained direct injury to its own business or property. The record reveals otherwise. First, the relief sought is exclusively on behalf of its members. The Association seeks specific performance of promises allegedly made to its members. By redressing injuries of its members, the Association hopes to receive the *derivative* benefit of redressing its own "injury."

Second the Association has not itself sustained *any* injury. Apart from the claims under § 1962(a), the Complaint alleges two types of injury:

1. The failure to provide asphalt roads has increased the Association's maintenance expenses, because asphalt roads are less expensive to maintain than gravel roads. The Association has judicially admitted, however, that it has refused to accept the conveyance of any roads which are not paved with asphalt. *Terre Du Lac Association v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 211 (Mo. App. 1987). The Association cannot have sustained legally cognizable damage in the form of maintenance costs on roads it has refused to accept.

2. The alleged fraud procured the sale of additional lots, resulting in greater use of existing roads and common facilities. The Association has judicially admitted, however, that TDL has refused to convey the "common facilities" to the Association. *Terre Du Lac Association v. Terre Du Lac, Inc., supra*, 737 S.W.2d at 211. As noted, the Association has refused to ac-

> cept any roads not paved with asphalt. Thus, greater use of gravel roads or common facilities neither owned nor maintained by the Association cannot have caused it any injury.

Even if its expenses had increased, the Association would not *itself* have sustained any injury to its business or property. All persons owning property in the subdivision must join the Association. As a non-profit corporation, the Association makes assessments equal to the cost of providing services to its members. Thus, any additional expenses caused by the sale of additional lots are precisely offset by additional income from those very members. Indeed, the Association pleads as much. Complaint, ¶ 137.

Respondents acknowledge that the Eighth Circuit rejected a similar argument in the first appeal. 772 F.2d at 473. That ruling underscores the real nature of the alleged Circuit conflict: it is purely a matter of semantics. Every Circuit would agree with the Eighth Circuit's ultimate holding — this Complaint does not state a claim. That other Circuits would rely on different grounds to reach that result is irrelevant.

III. The Doctrine Of Res Judicata Bars The Association's Claims Against C.I.T.

The sole pleaded basis for C.I.T.'s liability is its alleged status as a joint venturer with TDL. In the parallel state proceedings, the Missouri courts have specifically held that, as a matter of law, C.I.T. is not a joint venturer with TDL. *Terre Du Lac Association v. Terre Du Lac, Inc., supra,* 737 S.W.2d at 216-17.

C.I.T. is not liable under § 1962(a), unless it participated as a principal in the alleged pattern of racketeering. The Association makes no such allegation. C.I.T. is not liable under § 1962(c), unless it participated in the conduct of an enterprise's affairs through a pattern of racketeering activity. Again, the Association makes no such allegation.

The only basis for C.I.T.'s liability is its alleged status as a joint venturer with TDL. The Missouri courts have squarely held that C.I.T. is *not* a joint venturer:

> To plead a joint venture in debtor-lender, it is imperative to also plead that those parties specifically agreed to share the losses. Because Association's petition failed to plead that C.I.T. shared in the losses, the trial court properly dismissed Association's action against C.I.T. . . .

737 S.W.2d at 217.

The rules of Decision Act, 28 U.S.C. § 1738, requires the federal courts to accord *res judicata* effect to this judgment. C.I.T. is not engaged in a joint venture with TDL, and thus has no derivative liability for any of TDL's actions. There is no basis for the Association's claims against C.I.T.

CONCLUSION

The easy way to dispose of this Petition is to hold it pending a decision in *H.J.* The just and proper disposition is immediate denial of the Petition. A ruling in *H.J.* is unlikely prior to 1989. In the meantime, the pendency of this RICO claim has effectively blocked any further efforts to develop Terre du Lac. What person would be willing to buy a lot in Terre du Lac, when the Association is loudly proclaiming that TDL is a racketeer?

Since no Circuit would find that the Association has stated a cause of action, there is no just reason for this delay. Thus, respondents respectfully submit that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Cause No. 83-2577-C(3)

Jury Trial Demanded

Terre Du Lac Association, Inc. a not-for-profit corporation,

Plaintiff,

vs.

Terre Du Lac, Inc., Terre Du Lac Utilities Corp., Terre Du Lac Golf and Country Club, Inc., Terre Du Lac Country Club Associates, a limited partnership, Cit Corporation, Sensibar Enterprises, Inc., Moill, Ltd., and James O. Kwon,

Defendants.

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff herein, as of right pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, and for its claims against the defendants states as follows:

I. The Parties

1. The Plaintiff, Terre Du Lac Association, Inc. ("Association") is a Missouri not-for-profit corporation.

2. The plaintiff brings this suit on behalf and for the benefit of its members who heretofore have purchased lots in the Terre Du Lac Subdivision Development ("Terre Du Lac" or "Subdivision") from the defendants, and, as to certain claims asserted herein, on its own behalf, and/or on behalf of all of its members.

3. The defendant Terre Du Lac, Inc. ("TDL") is a Missouri corporation doing business in Missouri.

4. The defendant Terre Du Lac Utilities Corp. ("Utilities Corp.") is a Missouri corporation doing business in Missouri.

5. The defendant Terre Du Lac Golf and Country Club, Inc. ("Country Club, Inc.") is a Missouri corporation doing business in Missouri.

6. The defendant Terre Du Lac Country Club Associates ("Country Club Associates"), claim to be a limited partnership, and, in any event, is a partnership doing business within the State of Missouri.

7. Defendant Moill, Ltd., a Missouri corporation, claims to be the general partner of Country Club Associates, and the partnership's other partners, who claim to be limited partners, are five individuals including individual defendant James O. Kwon.

8. The Defendant CIT Corporation ("CIT") is a corporation qualified to do business in Illinois and doing business in Missouri. Although CIT is ostensibly simply the Developer's financier it has, as more fully set forth herein, acquired such interests and powers in and over the Developer and has exercised such influence and control over the Developer's activities that it, too, is a developer of Terre Du Lac.

9. The defendant James O. Kwon is president of defendant TDL, and as such represents and acts for and on behalf of TDL in the selling and offering for sale of lots within Terre Du Lac, under the direct or indirect influence and control of Sensibar Enterprises, Inc. Said defendant on information and belief also is an officer, director and/or Shareholder of Country Club, Inc. and Utilities Corp.

10. Defendants, TDL, Utilities Corp., Country Club, Inc., Kwon, Country Club Associates (collectively referred to as "the Developer"), were the developers of Terre Du Lac, and they offered and are offering for sale lots in Terre Du Lac by means of interstate commerce and mail under a common promotional plan. The sale of lots within Terre Du Lac fall within the ambit of the Interstate Land Sale for Disclosure Act (the "Act"), 15

U.S.C. §1701 *et seq.*, and the subdivision was registered under the Act.

11. Sensibar Enterprises, Inc. is a corporation which, as more fully set forth herein, has so controlled and directed the activities of other corporate defendants herein, except for CIT, that each must be held to be the *alter ego* of the other.

12. The term "Developer defendants" as uses herein means each of the aforementioned defendants, including CIT, which are jointly and severally liable for the matters hereafter alleged.

II. **Allegations Common to All Counts**

13. The development of Terre Du Lac was commenced in 1966 by the Big River Lakes Development Corporation, a Missouri corporation.

14. The concept for Terre Du Lac was to develop a private recreational lake-type development located mostly in St. Francois County and partially in Washington County, Missouri.

15. At a date unknown to plaintiff, but in or about early 1973, the Corporate name was changed from Big Rivers Lake Development Corporation to Terre Du Lac, Inc., for reasons unknown to plaintiff, and the original developer corporation continues to exist and operate as TDL.

16. The Association was organized and incorporated by or on behalf of the promoters of the Terre Du Lac development, including TDL.

17. Pursuant to restrictive covenants contained or incorporated by reference in the deeds to all lots located in the Terre Du Lac development, every person who purchases or otherwise acquires a lot in the Terre Du Lac development is required to be a member of Plaintiff Association.

18. This restriction applies whether the acquisition is made directly from the Developer of the Terre Du Lac development or from a lot owner other than the Developer.

19. At the present time, the Association has approximately four thousand members, each of whom owns one or more lots in the Terre Du Lac development.

20. Approximately three thousand four hundred of the Association's members purchased their lots from the Developer.

21. Substantially all of the Association's members acquired their lots in Terre Du Lac based at least in part upon their reasonable expectation that the Developer defendants would complete Terre Du Lac in the manner represented to persons who purchased lots directly from the Developer.

22. The principal exceptions to the allegations set forth above in Paragraph 21 are those members of the Association who are affiliated with the Developer defendants by reason of their employment by one or more of the Developer Defendants or by reason of their ownership of interests in one or more of the Developer Defendants.

23. Approximately 180 members of the Association purchased their lots in Terre Du Lac from the Developer prior to April, 1969.

24. Approximately 2,400 members of the Association purchased their lots in Terre Du Lac from the Developer between April, 1969 and October, 1977.

25. Approximately 600 members of the Association purchased their lots in Terre Du Lac from the Developer between November, 1977 and November, 1980.

26. Approximately 300 members of the Association purchased their lots in Terre Du Lac from the Developer between November, 1980 and the present.

27. The purposes and powers of the Association are fully set forth in its Articles of Incorporation and By-Laws, the most relevant provisions of which provide respectively as follows:

(a)

Article 2

Purposes

The purposes for which this Corporation is organized are the ownership, operation, management and maintenance of various areas and facilities lying within the land development known as Terre Du Lac in St. Francois and Washington Counties, State of Missouri, which may be hereafter transferred, deeded, or otherwise conveyed to the Association by the Big River Lakes Development Corporation, Inc., or their successors and assigns. Such areas and facilities shall be exclusively reserved for the common use and enjoyment of lot owners of said land development.

And further, to undertake the performance, of and to carry out the acts and duties incident to the administration of the operation and management of the areas commonly used by members of this Association, and to own, operate, maintain or otherwise deal with such property, whether real or personal, as may be necessary or convenient in the administration, protection and promotion of the general welfare of the members of this Association.

Article 3

Powers

The powers of the Association shall include and be governed by the following provisions:

The Association shall have all of the common law and statutory powers of a corporation not for profit conferred upon it by the Statutes of the State of Missouri, together with all of the powers reasonably necessary to implement the purposes of this Association, ...

(b)

BY-LAWS
OF
TERRE DU LAC ASSOCIATION, INC.

Section 1

Identity

These are the By-Laws of the Terre Du Lac Association, Inc., a Missouri Corporation, not for profit.

This Association has been corporately organized for the purpose of acquiring, owning, managing, maintaining, and operating common areas and facilities in the land development of the Big River Lakes Development Corporation, Inc., a Missouri corporation, known as Terre Du Lac situated in St. Francois and Washington Counties in the State of Missouri.

The common areas and facilities may be transferred, deeded or otherwise conveyed to the Association by the Big River Lakes Development Corporation, Inc. at such time and under such conditions as may by prescribed by the Big River Lakes Development Corporation, Inc.

Section 5

Membership; Members' Meetings; Voting and Proxies

The qualification of members, the manner of their admission to membership, the termination of such membership and voting by members shall be as follows:

A. The owners of all parcels of real property in the land development known as Terre Du Lac shall be members of the Association, and no other persons or entities shall be entitled to membership. In the event of more than one person holding such interest in any parcel, all such persons

shall be members, and the vote representing such parcel shall be exercised as agreed by such owners but in no event shall said owners be entitled to cast more than one vote respecting such parcel.

B. Membership shall be established by the acquisition of ownership of fee title to or fee interest in a parcel of real estate in said Terre Du Lac land development, whether by contract for deed, conveyance, devise, judicial decree or otherwise, subject to approval for membership in the Terre Du Lac Association. The new owner designated in such deed or other instrument shall thereupon become a member of the Association, and the membership of the prior owner, if any, as to the parcel designated shall be terminated.

Section 6

Board of Directors

The Board of Directors shall consist of six (6) members of the Association and one (1) appointee of the Big River Lakes Development Corporation, Inc. Said appointee shall receive no renumeration for his services on the Board of Directors.

* * *

Section 13

Road Maintenance

The Association shall maintain all roadways after permanent surfacing thereof by Big River Lakes Development Corporation, Inc.

28. In late 1973 CIT became involved in the development, at which time TDL executed a blanket Deed of Trust to CIT covering all the then unsold lots within Terre Du Lac and the emenities in the development, including, without limitation, the

golf courses and lakes and improvements thereto. CIT has been the principal finacier and lender for the development project ever since.

29. Continuing thereafter, TDL has routinely assigned , pledged or otherwise hypothecated to CIT all contracts for sale between TDL and individual purchasers of lots and homesites at Terre Du Lac.

30. Early in the relationship between TDL and CIT, in order to protect CIT's financial interests and provide for control by CIT over the actions and operations of the Developer (including TDL and its affiliated entities), the parties entered into an agreement in which CIT agreed to continue to finance the Developer's operation in Terre Du Lac and CIT was given a right to share in the pofits of TDL and a mutual right to control the operations of TDL, thus establishing a joint venture in law.

31. Since at least 1975, CIT has exercised substantial control over the operations of TDL and the sale of lots within Terre Du Lac, far exceeding the scope of normal financing practices.

32. Since at least 1978, CIT has dictated to its controlled-borrower corporations involved in Terre Du Lac a dividend policy which allows CIT to approve and/or suggest cash distributions that materially affect the financial statements of the Developer.

33. Prior hereto and continuing at present, defendant CIT exercised and is exercising such control and domination over the Developer defendant that the defendants in law must be deemed joint or co-venturers one with another, jointly and severally liable for obligations existing with respect to the development.

34. In 1975, TDL voluntarily declared itself to be bankrupt and underwent reorganization pursuant to the provisions of Chapter XI of the Bankruptcy Act.

35. As part of the plan of reorganization, Defendant Sensibar Enterprises, Inc. acquired all or at least a controlling por-

tion of the issued and outstanding stock of TDL and directly or indirectly, controlling interests in Country Club, Inc., Country Club Associates and Utilities Corp. This acquisition was completed on a date which is presently unknown to the Association, but which, on information and belief, was not later than November, 1977.

36. Sensibar thereupon selected and installed Defendant Kwon as the president and chief operating officer of TDL.

37. Since that time, Sensibar has directly or indirectly controlled and influenced the activities of TDL (subject to the limitations directly and indirectly imposed by CIT), and the other corporate defendants other than CIT.

38. Because the Association has not been made privy to the transactions and dealings between and among Sensibar and the other Developer defendants, the exact particulars of Sensibar's exercise of dominion and control and/or influence over TDL and the other Developer defendants (other than CIT) are not known to the Association or, to the Association's knowledge, to any of its members except those of its members who are affiliated with one or more of the Developer defendants and who will not share such information with the Association.

39. From and after the time at which Sensibar acquired shares of TDL, however, Sensibar was held out to the Association and the public generally, including the persons who are now members of the Association, both by Sensibar itself and by TDL as the controlling force behind TDL.

40. Sensibar and TDL actively sought to induce the public to deal with TDL and, in particular, to acquire property in the Terre Du Lac development in reliance upon Sensibar's reputation.

41. This was accomplished, in part, through written promotional materials, an example of which is annexed hereto and incorporated herein by reference as Exhibit 1.

42. Subsequent to Sensibar's acquisition of its controlling interest in TDL, on a date which is presently unknown to the Association, Sensibar is believed to have transferred its interest in TDL to certain persons who are officers and shareholders of Sensibar.

43. Notwithstanding a believed transfer of shares from Sensibar to its officers and shareholders, the relationship between Sensibar and TDL continued to be exploited for the purpose of promoting the sale of lots in the Terre Du Lac development after the transfer of ownership was affected, as, for example, in the promotional advertisement, a copy of which is annexed hereto as Exhibit 2.

44. Due to the intimate relationship between Sensibar and the holders of TDL stock, Sensibar must be deemed to have known of and approved and acquiesced in this ongoing exploitation of the relationship between Sensibar and TDL.

45. On information and belief, defendants TDL, Country Club, Inc., Country Club Associates, and Utilities Corp. were and still are all under common ownership and control principly of defendants Sensibar and Kwon.

46. Pursuant to the Interstate Land Sales Act, 15 U.S.C. §1701 *et seq.*, the defendants were required to provide to each original purchaser in the development a HUD Property Report prepared and issued by the defendants.

47. Defendants TDL, Country Club, Inc., Country Club Associates, Sensibar, and Utilities Corp. were and still are under common directorship and control.

48. Through the HUD Property Reports and oral representations of the defendants, it was continuously represented to purchasers of lots within Terre Du Lac that Utilities Corp. was responsible for maintenance and completion of the water and sewage disposal systems.

49. Through HUD Property Reports and oral representations of the defendants, it was continuously represented to purchasers of lots within Terre Du Lac that Country Club, Inc., and since sometime in 1983 Country Club Associates, were responsible for maintenance of the Terre Du Lac Country Club facilities until they are transferred to the Association.

50. Utilities Corp., Country Club, Inc. and Country Club Associates were held out by TDL and held themselves out to the Association and the public generally as affiliated and under the control of TDL.

51. At least prior to September 22, 1981, in each HUD Property Report issued to purchasers of property within Terre Du Lac, statements that all roads would be built with an asphalt surface as building growth progressed were included.

52. Within the aforesaid HUD Property Reports the defendants also represented that they would complete the sewage disposal system and the water system within Terre Du Lac.

53. During the course of sales at the Subdivision, representations were made by defendants and their agents to original purchasers that all amenities within Terre Du Lac would be transferred to the Association free and clear of all encumbrances, as growth of the Subdivision progressed.

54. In advertisements continuously issued by the Developer defendants, including but not limited to the advertisement which was distributed and commenced at least as early as April, 1981, a copy of which is annexed hereto as Exhibit 2, representations were made by the defendants that they would surface all roads within Terre Du Lac with a permanent asphalt surface over a stabilized base. Furthermore, oral representations were made by defendants that the roads, water system and sewage disposal system would all be completed by the defendants.

55. Since at least 1966, the Developer of Terre Du Lac has employed a staff of individuals whose employment respon-

sibilities included the obligation to act as sales representatives for the purpose of selling lots in Terre Du Lac.

56. At least since the time at which Sensibar first acquired its controlling interest in TDL, the staff has operated under the direct supervision and control of Defendant Kwon, and thereby under the direct influence and control of Sensibar.

57. On behalf of the Developers, and acting under instructions from the Developers, including Defendants Kwon, TDL and Sensibar, all of the members of this staff who were employed as sales representatives routinely and as a matter of practice made the following representations to prospective purchasers of lots in Terre Du Lac, including the present Association members: (1) that all roads within Terre Du Lac would be surfaced with a permanent asphalt surface; (2) that the water and sewage disposal systems would be completed by the defendants.

58. Additionally, it was from time to time represented by the sales representatives to prospective purchasers of lots, including certain persons now members of the Association, that the amenities within Terre Du Lac would be transferred to the Association free and clear of all liens and encumbrances, and that all amenities, including the Country Club facilities.

59. Members of the Association and the Association itself have suffered substantial harm by the defendants' refusals to fulfill their promises and obligations as hereinafter set forth. The Association is entitled to pursue these claims for itself and on behalf of its members.

III. **Jurisdiction**

60. The Court has jurisdiction of this case pursuant to 28 U.S.C. §1331, 15 U.S.C. §26, 15 U.S.C. §1701 *et seq.*, 18 U.S.C. §§1964, 1965, and, with respect to certain Counts herein contained, pursuant to the principles of pendent jurisdiction.

IV. Causes of Action

1. Count I

61. The allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

62. The Developer defendants, with respect to the sale and offer to sell of lots within Terre Du Lac did employ a device, scheme, and artifice to defraud purchasers by making representations that all roads within the Subdivision would be completed with a permanent asphalt surface over a stabilized base, that the water and sewage disposal system would be completed by the Developer defendants and service continuously provided to purchasers, that the amenities within Terre Du Lac would be transferred to the Association free and clear of all liens and encumbrances, and that all members of the Association could use all the emenities, including the Country Club facilities, when in fact the Developer defendants (a) had no intention of so completing the roads and water and sewage disposal systems, transferring all the amenities to the Association, or permitting all members to use the Country Club facilities, (b) with the exceptions of CIT and Sensibar, had no capacity to so complete the roads and water and sewage sidposal system, and (c) knew or should have known that the roads and water and sewage disposal system would not be completed by the Developer, that the amenities would not be transferred, and that members would not be permitted to use the Country Club facilities, all of which is in violation of 15 U.S.C. §1703(a)(2)(A).

63. In aid of this scheme to defraud, Defendants TDL and KWON were responsible for employing and supervising the sales force, approved the advertising/marketing program employed, and instructed the sales force to make the various alleged representations; defendant Sensibar, as more fully set out in paragraphs 35-44, inclusive, exercised dominion and control over TDL and KWON so that the doctrine of *alter ego* is applicable; Defendant CIT, as more fully set out in paragraphs

28-33, was in such a position that it was a joint venturer of TDL.

64. Utilities Corp. was aware and did acquiesce in the representations made to purchasers of lots in Terre Du Lac regarding the completion of the water and sewage disposal systems, when in fact it (a) had no intention of so completing the water and sewage disposal system; (b) had no capacity to so complete the water and sewage disposal systems, and (c) knew or should have known that the water and sewage disposal systems would not be completed by the Developer.

65. Country Club, Inc. and Country Club Associates were aware and did acquiesce in the representations made to purchasers of lots in Terre Du Lac regarding the right of every member of the Association to use the Country Club facilities and the promise to transfer the Country Club facilities to the Association, when in fact they (a) had no intention of complying with such representations and promises; (b) had no capacity to comply with such representations and promises; and (c) knew or should have known that members of the Association would not be permitted to use the Country Club facilities and the Country Club facilities would not be transferred to the Association.

66. The Developer continually represented to and assured the Association and members of the Association that the roads within Terre Du Lac would be completed with an asphalt surface by the Developer, that the water and sewage disposal system would be completed by the Developer, that the amenities would be transferred to the Association, and that all members would be permitted to use the Country Club facilities.

67. In making these representations, the Developer established and represented to the Association and its members a timetable for fulfilling these representations which was calculated to conceal the Developer's true intentions until points in time which were distant in time from the points at which the representations were made.

68. The purpose of this timetable was to enable the Developer to aviod and frustrate the claims of the Association and its members arising from these representations.

69. The Association and members of the Association reasonably relied on the Developer's conduct and representations in forebearing suit to enforce their rights, and thus defendants are equitably estopped from asserting the statute of limitations as to any member of the Association pursuant to 15 U.S.C. §1711.

WHEREFORE, plaintiff prays for judgment against the Developers, their joint adventurer CIT, and James Kwon as their agent and prays pursuant to 15 U.S.C. §1709(a) for specific performance of the representations made and pursuant to 15 U.S.C. §1709(c) for an award of prejudgment interest, attorneys' fees, litigation expenses and costs and for such other and further relief as the Court deems meet and proper in the premises.

COUNT II

70. All allegations and contentions hereinabove are hereby realleged and incorporated fully herein by reference.

71. The defendants, with respect to the sale and offer to sell of lots within Terre Du Lac, did represent to members of the Association who purchased lots that the roads, sewers, water system, and other amenities would be provided and completed by the Developer and transferred to the Association and that members of the Association could use all amenities, including the Country Club facilities, without expressly stipulating in the contracts of sale entered into between the defendants and purchasers during 1980 and 1981, that such services and amenities would be provided, all of which is in violation of 15 U.S.C. §1703(a)(2)(D).

WHEREFORE, plaintiff prays for judgment against the Developer, its joint venturer CIT, and James O. Kwon and pur-

suant to 15 U.S.C. §1709(a) prays for specific performance of the representations made and pursuant to 15 U.S.C. §1709(c) prays for an award of court costs, and reasonable amounts for attorney's fees, independent appraiser's fees and travel to and from the lots and such further relief as this court deems proper.

COUNT III

72. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

73. All HUD Property Reports issued by the defendants prior to the Property Report dated September 22, 1981 contained the untrue statement of material fact that all roads would be completed with an asphalt surface and that the water and sewage disposal systems would be completed by the Developer, and all Hud Reports prior to April 1, 1983 contained the untrue statement of material fact that all members of the Association could use all amenities, including the Country Club facilities, all of which is in violation of 15 U.S.C. §1703(a)(2)(C).

WHEREFORE, plaintiff prays for judgment against the Developers and their joint venturer CIT, and James O. Kwon as their agent and pursuant to 15 U.S.C. §1709(a) prays for specific performance of the representations made and pursuant to 15 U.S.C. §1709(c) prays for an award of pre-judgment interest, attorney's fees, litigation and costs and for such other and further relief as the Court deems meet and proper in the premises.

COUNT IV

74. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

75. Through all the above actions of the defendants, they have engaged and are engaging in transactions, a practice and course of business which operated and continues to operate as a fraud and deceit upon purchasers of lots within Terre Du Lac, all of which is in violation of 15 U.S.C. §1703(a)(2)(C).

WHEREFORE, plaintiff prays for judgment against the Developers, their joint venturer CIT, and James O. Kwon as their agent and pursuant to 15 U.S.C. §1709(a) prays for specific performance of the representations made and pursuant to 15 U.S.C. §1709(c) prays for an award of pre-judgment interest, attorney's fees, litigation expenses and costs and for such other and further relief as this Court deems meet and proper in the premises.

COUNT V

76. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

77. The Defendants did, to obtain money and to induce purchasers of lots to continue to make payment on their notes, make untrue statements of material fact in HUD Property Reports, in advertisements, and in face-to-face conversations.

78. Such untrue statements regarded the completion of raods with a stabilized base and a permanent asphalt surface and proper completion of the water and sewage disposal systems within Terre Du Lac by the Developer, the right to use all amenities, and the transfer of all amenities to the Association, all of which is in violation of 15 U.S.C. §1703(a)(2)(D).

WHEREFORE, plaintiff prays for judgment against the defendants and pursuant to 15 U.S.C. §1709(a) prays for specific performance of the representations made and pursuant to 15 U.S.C. §1709(c) prays for an award of pre-judgment interest, attorney's fees, litigation expenses and costs and for such other and further relief as this Court deems meets and proper in the premises.

COUNT VI

79. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

80. CIT, exercising substantial and dominant control over the Developers, actively participated in and aided the advancement of the violations of the Act, 15 U.S.C. §1703, as alleged in Counts I-V, to the extent that CIT is liable for aiding and abetting the Developers in violating the Act.

WHEREFORE, plaintiff prays for judgment against CIT and pursuant to 15 U.S.C. §1709(a) prays for specific performance of the representations made and pursuant to §1709(c) prays for an award of pre-judgment interest, attorney's fees, litigation expenses and costs and for such other and further relief as the Court deems meet and proper in the premises.

COUNT VII

81. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

82. The members of the Association entered into contracts of sale with the defendants to purchase lots in Terre Du Lac.

83. Incorporated by reference and law into each contract of sale was the HUD Property Reports issued by the defendants, and the promises to complete all roads within Terre Du Lac with a stabilized base and a permanent asphalt surface, to properly complete the water and sewage disposal systems within Terre Du Lac, and to permit all members use of all amenities, including the Country Club facilities.

84. The Developer now refuses to complete the roads, water system, and sewage disposal system in breach of the contracts of sale, and refuses to permit all members of the Association to use all amenities, including the Country Club facilities, and plaintiff and its members are entitled to an order of specific performance requiring compliance with the aforesaid contractual obligations.

WHEREFORE, plaintiff prays for judgment against the Developers, their joint venturer CIT, and James Kwon as their agent declaring that said contracts of sale have been breached

and granting specific performance to place a stabilized base and permanent asphalt surface or all roads within Terre Du Lac, to complete the water and sewage disposal systems, and to permit all members of the Association whose lots were purchased from the Developer prior to April 1, 1983 to use all amenities in the development, including the Country Club facilities, for plaintiff's costs herein expended, and for such other and further relief as the Court deems meet and proper in the premises.

COUNT VIII

85. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

86. That the defendants contrary to their representations, knew and have known (a) that they could or would not complete the water and sewage disposal systems and asphalt all roads within Terre Du Lac; (b) that they could or would not transfer all completed amenities to the Association; and (c) that they could or would not permit all members of the Association who purchased lots prior to April 1, 1983 to use all amenities in the development, including the Country Club facilities.

87. Acting in reasonable reliance upon the representations made by the defendants, members of the Association entered into contracts of sale to purchase lots within Terre Du Lac.

88. Neither the Developer nor any other person has fulfilled the promises made to plaintiff's member-purchasers in regard to the completion of roads and the water and sewage disposal systems within Terre Du Lac, the transfer of amenities, or the free use of the amenities.

89. By reason of the foregoing acts and practices, the defendants have breached their contractual obligations and engaged in willful fraud and misrepresentations and deceit upon members of the Association who purchased lots from the defendants.

90. In aid of this scheme to defraud, Defendants TDL and KWON were responsible for employing and supervising the sales force, approved the advertising/marketing program employed, and instructed the sales force to make the various alleged representations; defendant Sensibar, as more fully set out in paragraphs 35-44, exercised dominion and control over TDL and KWON so that the doctrine of *alter ego* is applicable; Defendant CIT, as more fully set out in paragraphs 28-33, was in such a position that it was a joint venturer of TDL.

WHEREFORE, plaintiff prays for judgment against the Developers and their co-adventurer CIT, and against James O. Kwon as their agent and as the *alter ego* of TDL declaring that said contracts of sale have been breached and granting specific performance of the representations made, for plaintiff's costs herein expended and for such other and further relief as the Court deems meet and proper in the premises.

COUNT IX

91. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

92. Alternatively, plaintiff is entitled to an award of damages in an amount sufficient to place a stabilized base and permanent asphalt surface on all roads at Terre Du Lac and to properly complete the water and sewer systems at Terre Du Lac, and to adequately compensate the members of the Association for the other breached promises regarding transfer and use of the amenities.

93. Defendants further should be assessed exemplary damages in an amount sufficient to penalize them for their fraud and deceit and to deter others from similar conduct in the future.

WHEREFORE, plaintiff prays for damages against defendants and each of them in an amount sufficient to provide and

place a stabilized base and permanent asphalt surface on all roads in Terre Du Lac, to complete the water and sewer systems therein, and to compensate members of the Association for breach of promises regarding transfer and use of the amenities, further for exemplary damages in an amount just under the circumstances, for plaintiff's costs herein expended, and for such other and further relief as the Court deems meet and proper in the premises.

COUNT X

94. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

95. CIT took possession or assignment of notes and/or contracts of deed made by members of the Association, in bad faith, knowing that the Developer either could not or would not complete the roads and water and sewage disposal systems within Terre Du Lac, and knowing that the Developer was violating or would violate the Act.

96. CIT therefore is not a holder in due course with respect to said notes and/or assignments of contracts for deed and CIT is subject to defenses personal between the original buyer-members of the Association and the Developer. Members of the plaintiff Association thus could cease payment on said obligations without liability in law, but to do so would result in multiplicitous legal actions by CIT subjecting the Association's members to costs and attorney's fees.

97. A justiciable issue thus exists as to CIT's legal status and ability to enforce its rights as assignee of any members' contracts and/or notes assigned from the Developer, and a declaratory judgment should issue that CIT is not a holder in due course and not entitled to receive any further payments thereunder.

WHEREFORE, plaintiffs pray for judgment against CIT declaring that CIT is not a holder in due course as to notes

and/or contracts of deed it possesses which originally were entered into by members of the Association in connection with the purchase of lots within Terre Du Lac, that CIT is subject to all claims and defenses the members have as to the Developers, that CIT due to the Developers' breach of obligations is entitled to no further payments pursuant thereto, for an order requiring delivery of warranty deeds to the member-purchasers, for plaintiff's costs herein expended and for such other and further relief as the Court deems meet and proper in the premises.

COUNT XI

98. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

99. The Developers through Utilities Corp. heretofore have promised, contracted and covenanted in recorded deeds with and to plaintiff and plaintiff's members that Utilities Corp. would through use of a pumping system maintain the pool level of Terre Du Lac lakes sufficient for proper recreational purposes.

100. The Developers, specifically including Utilities Corp., have failed to comply with their obligations in this regard and continue to fail to comply notwithstanding due demand by plaintiff, to the damage and detriment of plaintiff and its members.

101. Plaintiff is entitled to an award of damages for said breach of defendants in an amount not presently ascertainable with exactitude but in any event sufficient to construct and operate pumping systems sufficient to maintain a proper recreational pool level in Terre Du Lac lakes.

WHEREFORE, plaintiff prays judgment against all defendants, jointly and severally, in an amount sufficient to construct and operate pumping systems sufficient to maintain a proper recreational pool level in Terre Du Lac lakes, for its costs herein

expended, and for such other and further relief as the Court deems meet and proper in the premises.

COUNT XII

102. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

103. The Developers in selling lots and homesites in Terre Du Lac, represented and promised to purchasers thereof that utility service, including sewer and sewage treatment, would be available continuously in exchange only for payment per purchaser of a hook-up charge and usage fee.

104. Contrary to and in violation of the aforesaid representations, Developersthrough Utilities Corp. sought in late 1981 and received in 1982 a rate base certification from the Missouri Public Service Commission which results in an additional utilities charge allocated among plaintiff and its members in the amount of an annual percentage of the rate base in effect from year to year.

105. Developers' false representations concerning utilities charges and subsequent intentional wrongful action in obtaining a rate base certification has proximately caused damage to plaintiff and its members in the amount of the aggregate rate base addition to annual utilities charges assessed at Terre Du Lac.

WHEREFORE, plaintiff prays judgment against all defendants, jointly and severally, in the amount of the aggregate annual rate base addition to utilities charges at Terre Du Lac for the calendar y ears 1982 and 1983, for a declaratory judgment that all such additions to utilities charges in subsequent years may not be assessed or collected by Utilities Corp. because of the misrepresentations of the defendants, for its costs herein expended and for such other and further relief as the Court deems meet and proper in the premises.

COUNT XIII

106. All allegations and contentions contained hereinabove are hereby realleged and incorporated fully herein by reference.

107. In connection with its actions in selling lots and homesites within Terre Du Lac, the Developers promised and covenanted to plaintiff and its purchaser-members that the amenities at Terre Du Lac available for common use by members would be conveyed, upon completion, to the Association free and clear of all liens and encumbrances.

108. Prices for lots and homesites at Terre Du Lac have been and are being set including a price component relating to the allocated share of the costs of the amenities.

109. While some amenities at Terre Du Lac have been conveyed to the Association by the Developers, the Developers have failed and refused and continue to fail and refuse to convey to the Association the following completed amenities, to-wit: the nine-hole golf course, the eighteen-hole golf course, the tennis courts, the country clubhouse, the pavillion and adjacent common real estate.

110. On information and belief, the Developers' continuing breach of promise and misrepresentations has bee participated in and induced by CIT because of the level of indebtedness owed to CIT by the Developers.

111. The Developers are wrongfully operating the amenities which are rightfully the property of the Association and the Association is entitled either to an immediate conveyance of said amenities free and clear of all encumbrances or, in the alternative, an award of damages in an amount equal to the fair value of all completed amenities not yet conveyed to the Association, without deducting therefrom any existing lien or encumbrance.

112. On information and belief, the Developers are attempting to sell the amenities, to which they have no right, to third

persons or entities in fraud of the Association and its members and in derogation of their rights. Such efforts constitute a wrongful act for which exemplary damages should be assessed.

WHEREFORE, plaintiffs pray for judgment against all defendants, jointly and severally, requiring the conveyance to the Association free and clear of all liens and encumbrances of all completed Terre Du Lac amenities which have not been heretofore so conveyed, or in the alternative, for an award of damages against all defendants, jointly and severally, in the amount of the fair value of all said amenities without deducting therefrom any existing liens or encumbrances, plus an award of exemplary damages in an amount sufficient to punish defendants for their wrongful conduct and to deter others from similar conduct in the future, for plaintiff's costs herein expended and for such other and further relief as the Court deems meet and proper in the premises.

COUNT XIV

113. All allegations and contentions contained thereinabove are hereby realleged and incorporated fully herein by reference.

114. The Developers in selling lots and home sites in Terre Du Lac prior to April, 1977, represented and promised to purchasers thereof that membership in the Terre Du Lac Country Club would be available continuously, free of charge to all lot owners.

115. Contrary to and in violation of the aforesaid representations, Developers, through Terre Du Lac Golf and Country Club, Inc. and Terre Du Lac Golf and Country Club Associates, began in 1983 to require each "Class B" member of the Terre Du Lac Golf and Country Club to pay a $60 annual fee in order to retain membership in the Terre Du Lac Golf and Country Club.

116. In the HUD Property Reports issued by the Developer prior to the April 1, 1983 Property Report, statements that all

members of the Association, members' families and their invited guests may use all the recreational facilities, including the Country Club facilities within Terre Du Lac, were included.

117 Defendants are no longer permitting members of the Association to use the Country Club facilities unless they become members of the Country Club and pay membership fees.

118. On information and belief, defendants are participating with others in a plan intended to force lot owners to contribute thousands of dollars each to buy-in to a "membership" granting them a right to use the Country Club and related facilities, a right the lot owners already have in law, and said actions are wrongful and constitute an actionable breach of the Developers promises and contracts.

119. Developers' false representations concerning Terre Du Lac Golf and Country Club membership rights and subsequent intentional wrongful action in instituting an annual membership fee has proximately caused damage to plaintiff and its members in the amount of the aggregate annual membership fees assessed at Terre Du Lac.

WHEREFORE, plaintiff prays judgment against all defendants, jointly and severally, in the amount of the aggregate annual membership fees at Terre Du Lac for the calendar year 1984, for a declaratory judgment that all such membership fees in subsequent years not be assessed or collected by Terre Du Lac Golf and Country Club, Inc. or any present or future owner of the Country Club facilities because of the misrepresentations of the defendants, for its costs herein expended, and for such other and further relief as the Court deems meet and proper in the premises.

COUNT XV

120. The allegations and contentions hereinabove set forth are realleged and expressly incorporated herein by reference.

121. Defendants TDL, Utilities Corp., Country Club, Inc., Country Club Associates, CIT and Kwon have associated themselves with one another for the common purposes of marketing and facilitating the marketing of lots located in the Terre Du Lac subdivision and of operating the Terre Du Lac subdivision development, its amenities and utilities, all for their collective and mutual profit.

122. As such, these defendants have created an enterprise (hereinafter referred to as the "Development") within the meaning of Section 1961(4) of Title 18 of the United States Code, 18 U.S.C. § 1961(4).

123. The Development is engaged in interstate commerce in that, among other things, the Development promotes the sale, and, through one of its members, TDL, actually sells parcels of real estate located in the State of Missouri to persons who are not residents of that state.

124. Additionally, the Development is engaged in activities affecting interstate commerce at least in that, using the means and instrumentalities of interstate commerce, the Development, through its members, transmits (or heretofore transmitted) promotional materials and property pertaining to the Terre Du Lac subdivision.

125. Each of the corporations and partnerships named as defendants herein is a separate "enterprise" within the meaning of Section 1961(4) of Title 18 of the United States Code, 18 U.S.C. §1961(4).

126. Each of the corporations and partnerships named as defendants herein is engaged in interstate commerce or is engaged in activities affecting interstate commerce.

127. Defendant Kwon is directly or indirectly associated through employment or ownership of an interest in each of the entities identified above as "enterprises" other than Defendant CIT.

128. During the ten-year period preceding December 1, 1983, Defendants TDL and Kwon, with the advice, knowledge, consent and active assistance of Sensibar, conceived of and engaged in a pattern of racketeering activity which consisted of, among other things:

(a) Commencing in or about 1977, and continuing until at least September 22, 1981, the Defendants TDL, Kwon and Sensibar conceived of and implemented a scheme to obtain monies from prospective purchasers of lots in Terre Du Lac by means of false or fraudulent pretenses, representations or promises, which included, but were not limited to, false representations and promises that the Developer would complete all roads in the Terre Du Lac subdivision with an asphalt surface on a stabilized base, would complete the sewage disposal and water systems of the Terre Du Lac subdivision, would transfer the amenities of Terre Du Lac to the Association, that an attribute of membership in the Association was that use of the facilities owned, maintained and operated by Country Club, Inc. and Country Club Associates would be available without further membership charges, and that the services and facilities of Utilities would be available only for a hook-up charge and a usage fee;

(b) In furtherance of the scheme, the defendants and, in particular, Defendants TDL and Kwon (under the supervision and control of Sensibar), by themselves and through the sales staff employed by and controlled by TDL and Kwon, respectively, did continuously represent to each person who was a prospective purchaser from TDL of a lot in the Terre Du Lac subdivision the matters set forth above, when in fact TDL, Kwon and the other Developer defendants knew these representations to be false and had neither the intention to fulfill these representations nor, in the case of the defendants other than Sensibar and CIT, the capacity to fullfill these promises and representations.

129. In furtherance of the scheme, the defendants utilized the mails in at least the following respects, each of which constitutes

a separate violation of 18 U.S.C. §1341 on each occasion it was done by the defendants:

(a) Defendant TDL, directly or through its agents and/or attorneys, transmitted through the United States Mails copies of drafts of each HUD Property Report prepared by TDL for review by the appropriate federal authorities;

(b) Defendant TDL, directly or through its agents and/or attorneys, transmitted through the United States Mails the final version of each HUD Property Report issued respecting the Terre Du Lac subdivision to the appropriate federal authorities for the purpose of filing or facilitating the filing of the reports with such authorities;

(c) TDL transmitted through the United States Mails to potential purchasers of lots in the Terre Du Lac subdivision promotional materials, some of which included the false and misleading statements concerning the Developer's intentions to construct an asphalt surfaced road system in the Terre Du Lac subdivision and complete the sewage disposal and water systems in the development, including, but not limited to, the materials annexed hereto as Exhibits 1 and 2;

(d) TDL and CIT received through the United States Mails checks from victims of their scheme representing payments on contracts for deeds to lots in the Terre Du Lac subdivision, or payments or indebtedness secured by lots in the Terre Du Lac subdivision, which checks TDL and CIT deposited with banks that, in turn, utilized the United States Mails to collect thereon.

130. TDL and Sensibar invested the proceeds of the aforesaid pattern of racketeering activity — *i.e.*., the proceeds of the sales of lots in the Terre Du Lac subdivision — in themselves and, to a lesser extent, in the Development, TDL using such proceeds to satisfy certain of its outstanding obligations to CIT and to pay dividends to Sensibar, and Sensibar using such proceeds as it receives from TDL in furtherance of its usual business, all in violation of 18 U.S.C. §1962(a).

131. CIT has received the proceeds of the aforesaid pattern of racketeering activity — *i.e.*, the proceeds of the sale of lots in the Terre Du Lac subdivision development and the interest on the indebtedness arising out of such sales — and invested it in its own operations, all in violation of 18 U.S.C. §1962(a).

132. Additionally, Sensibar, TDL and Kwon have, by reason of the foregoing, conducted the affairs of the Development and TDL through the aforesaid pattern of racketeering activity, all in violation of 18 U.S.C. §1962(c).

133. TDL, through its owners, officers, directors and promoters, caused the Plaintiff Association to be so organized that the Association has a legal obligation to its members (the owners of lots in Terre Du Lac) to maintain, upon proper completion, the roads located in the Terre Du Lac subdivision.

134. The cost to the Plaintiff Association of maintaining the roads in the Terre Du Lac subdivision has been and will be materially increased absent relief herein as prayed because of the substantially greater cost of maintaining roads without asphalt pavement over the cost of maintaining roads which have been properly constructed with paved asphalt surfaces over a stabilized base.

135. The Plaintiff Association has been materially damaged in its business and property by the violations of 18 U.S.C. §1962(a) set forth above in that, among other things, by investing the proceeds of the Defendants' racketeering activity in TDL, Sensibar and CIT, these funds have been diverted from investment in the infrastructure of the Terre Du Lac subdivision, including its roads, sewage and water systems, and emenities, all to the damage of the Association and it members.

136. The Plaintiff Association has been damaged in its business and property by the violation of 18 U.S.C. §1962(c) described above in that, among other things, the defendants, by conducting the affairs of the Development, TDL and CIT

through a pattern of racketeering activity, have succeeded in selling substantially more lots in the Terre Du Lac subdivision than would otherwise have been the case, resulting in an increase in the quantity of roads in Terre Du Lac which are in regular use, and in a commensurate increase in the usage of the facilities, including the roads, which the Association is obliged to maintain (once completed) all of which has resulted and will result in further increases in the Association's costs of fulfilling its legal obligations.

137. The members of the Association have been individually damaged in their properties by reason of the aforesaid violations of 18 U.S.C. §1962(a) and (c), in that, among other matters:

(a) They are subject to and have already been subjected to levies by the Association made for purposes of repairing and maintaining the common facilities, including the roads, located in the Terre Du Lac subdivision;

(b) They have been induced to pay excessive prices for their property located in the Terre Du Lac subdivision;

(c) The value of their properties located within Terre Du Lac has been diminished, or has not appreciated as it otherwise would have;

(d) They have been deprived of their right to use the amnenities of Terre Du Lac and of the use of paved roads in Terre Du Lac; and

(e) They have been subjected to charges for utility services over and above those to which, but for the violations, they would have been subjected.

WHEREFORE, the Association prays that this Court enter its Order pursuant to 18 U.S.C. §1964(a) compelling the defendants to complete the road, water and sewage systems of Terre Du Lac, Inc., (b) impressing upon the defendants' interests in

any and all property directly or indirectly related to the Terre Du Lac subdivision, including, but not limited to, the land and improvements thereon located within the subdivision and the notes, contracts for deed, or other obligations held by the defendants arising out of the sale of lots in the Terre Du Lac subdivisions, a constructive trust for the benefit of the Association and its members, (c) compelling defendants to divest themselves of any and all continuing ownership interest which they have, directly or indirectly, in any real or personal property, including improvements thereto, located within the Terre Du Lac subdivision by transferring the same to the Association free and clear of all liens and encumrances, and (d) for such other and further relief as this Court deems meet and proper under the circumstances.

COUNT XVI

138. All allegations and contentions hereinabove are hereby realleged and incorporated fully herein by reference.

139. The defendants have a monopolistice control over the membership rights to the Terre Du Lac Golf and Country Club.

140. The initiation fee for a family golf membership is and has been substantial since 1977, and is currently $3,000.00.

141. The initiation fee is non-refundable and allegedly non-transferable and according to the HUD Property Reports do not run with the land acquired by a purchaser.

142. The present practice of the defendants is to waive the initiation fee in respect to any purchaser whose lot is purchased from the defendants. However, any purchaser within the Subdivision whose lot is purchased from someone other than the defendants must pay the initiation fee to obtain a family golf membership.

143. Such conduct on the part of defendants has a substantial effect on the competition for sales of lots within Terre Du Lac

and is a tie-in arrangement, which is a per se violation of §1 of the Sherman Act.

144. Such conduct on the part of the defendants harms all members of the Association as well as the Association itself, which is a property owner in its own right, insofar as affecting their ability to competitively resell their lots.

145. On information and belief, defendants, unless restrained, will continue with their tie-in arrangement regarding the sale of lots within Terre Du Lac and membership right in the Terre Du Lac Golf and Country Club, thereby precluding Association members from obtaining the fair market value for sale of their lots, and the Association is entitled to injunctive relief from defendants' continuation of their tie-in arrangement.

WHEREFORE, plaintiff prays for judgment against the defendants and pursuant to 15 U.S.C. §26, prays for injuctive relief against the continued practice.

Respectfully submitted,

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PLAINTIFF DEMANDS TRIAL
BY JURY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed, postage prepaid to William J. Garmisa, Esq., Greenberg, Keele, Lunn & Aronberg, One IBM Plaza, Suite 4500, Chicago, Illinois 60611; Donald L. James, Esq., Brown, James & Rabbitt, P.C., 705 Olive, Suite 1100, St. Louis, Missouri 63101; John W. Reid, II, Esq., Schnapp, Graham & Reid, 135 East Main, Fredericktown, Missouri 63645; Robert A. Chasnow, Esq., Ingersoll & Block, 1401 Sixteenth Street N.W., Washington, D.C. 20036; Richard S. Brownlee, III, Esq., Hendren & Andrae, 235 East High Street, P.O. Box 1069, Jefferson City, Missouri 65102; Joseph P. Conran, Esq., Husch, Eppenberger, Donohue, Elson & Cornfeld, 100 North Broadway, St. Louis, Missouri 63102 on this 6th day of March, 1984.

/s/ James G. Martin